IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0441

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA DON LARSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court, Missoula County,
The Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly and within its discretion deny Larson's motion for the suppression of evidence?

2. Did the district court properly and within its discretion permit law enforcement officers to testify about their observations of Larson's marijuana impairment at his DUI trial? Did sufficient evidence support the jury's verdict of guilt for DUI?

3. Did the district court properly and within its discretion deny Larson's proposed jury instruction?

STATEMENT OF THE CASE AND FACTS

This case presents the timely appeal by Joshua Don Larson of a second offense DUI entered by the Missoula County District Court, the Honorable John W. Larson, presiding. This case began after midnight on Sunday, September 21, 2008, at Reserve and South Avenue in Missoula, when Sherriff's Deputy Scott King stopped Larson's vehicle based on Larson's careless driving behavior. King observed Larson screech and spin his tires progressively through an intersection as well as observing Larson's vehicle with oversized tires and no mud flaps. (Tr. at 98-99.) King testified he also observed Larson make a wide

turn almost all the way into the oncoming traffic lane after King initiated his hood lights for the traffic stop. (Tr. at 99, 101, 108:22-23.)

Just after the stop, King observed upon speaking to Larson that Larson slurred his words, talked slowly, and moved slowly to retrieve his requested driver's license, proof of registration and insurance. (Tr. at 100-01.) Shortly after the stop, Larson also volunteered to King that he had been drinking alcohol during the day. (Tr. at 101, 231.) King requested Larson perform field sobriety tests due to King's observations that Larson appeared impaired and Larson's admission regarding drinking alcohol. (Tr. at 101.) King conducted standardized field sobriety tests, where Larson displayed more indicators of intoxication and blew a .023 on the breath test. (Tr. at 121-23, 150.)

King reported that "due to my training and experience I knew from Joshua's poor performance of the SFST's and lack of alcohol in his system that he was under the influence of a drug." (D.C. Doc. 18, State's Ex. A.) Larson admitted to the deputy that he had smoked marijuana approximately an hour before King stopped him. (Tr. at 107:14-15; 285:13.) Larson voluntarily returned to his vehicle to remove and turn over a pipe and marijuana before there was opportunity for the deputy to issue a consent form to search. (Tr. at 103:6; 128:7-11; 138:6; 236:12-20.) After a pretrial suppression hearing, the court determined that Larson's admissions regarding alcohol and marijuana use were

voluntarily given, there was no interrogation warranting Miranda[1] warnings, and there was no search requiring consent, as Larson voluntarily relinquished the marijuana and paraphernalia. (D.C. Doc. 33 at 7.)

The State charged Larson with Operating a Motor Vehicle While under the Influence of Alcohol or Drugs, second offense. (Justice Ct. Doc. Oct. 17, 2008.) After a trial held on May 11-12, 2009, a jury found Larson guilty. (Trial Tr. at 392:22.) The court sentenced Larson to six months in the county jail with all but seven days suspended. (D.C. Doc. 41 at 2.) The State will discuss additional record facts in the arguments that follow.

STANDARDS OF REVIEW

In reviewing a district court's denial of a Motion to Suppress, this Court initially reviews the court's findings to determine whether they are clearly erroneous. State v. Jones, 2006 MT 209, ¶ 17, 333 Mont. 294, 142 P.3d 851. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of that evidence, or if a review of the record leaves this Court with a definite and firm conviction that the district court made a mistake. Id. This Court then applies plenary review to the district court's conclusions of law to determine whether the court's interpretation of the law is

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

correct. Id. This Court has stated that "[t]he specific question of whether a defendant has given a voluntary confession is largely a factual determination that is within the discretion of the district court." Id. (internal citations and quotation marks omitted). The same analysis should apply to the issue of whether a defendant voluntarily waived his Miranda rights.

The admissibility of evidence is left to the discretion of the district court judge. State v. Lancione, 1998 MT 84, ¶ 20, 288 Mont. 228, 956 P.2d 1358; State v. Gollehon, 262 Mont. 293, 301, 864 P.2d 1257, 1263 (1993). A court abuses its discretion if it acts arbitrarily or unreasonably, and a substantial injustice results. State v. Bonamarte, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457. The burden to demonstrate an abuse of discretion is on the party seeking reversal of an unfavorable ruling. State v. Griffin, 2007 MT 289, ¶ 10, 339 Mont. 465, 172 P.3d 1223.

This Court reviews claims of instructional error to determine whether the jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. State v. Swann, 2007 MT 126, ¶ 32, 337 Mont. 326, 160 P.3d 511. The district court has broad discretion when instructing a jury, and the court's rulings on proposed instructions are reviewed on appeal for abuse of discretion. Id.

SUMMARY OF THE ARGUMENT

Motion to Suppress. The quantity and quality of objective information available to the experienced police officers here amply established particularized suspicion justifying the traffic stop and the resulting field sobriety testing. Among other reasons, Deputy King expressly testified he observed Larson's tire screeching, engine revving, and unlawful oversized tires, and no mud flaps. Larson's counter-arguments impermissibly request this court to reweigh evidence and newly assess witness credibility. His entire "divide and conquer" approach to reviewing the traffic stop is erroneous. The scope of the traffic stop passes muster under federal and state constitutional analyses. His apparent claim of involuntary consent is contradicted by the officers, whose testimony the district court accredited. Larson's claim that because he was detained when questioned about alcohol and drugs he could not, *a priori*, give consent, is not borne out by the record, not consonant with the totality of the circumstances test this Court uses to scrutinize voluntariness of consent, and does not track federal constitutional law.

Motion to Dismiss. Larson's reliance on State v. Nobach, 2002 MT 91, 309 Mont. 342, 46 P.3d 618, is misplaced for many reasons. This Court in Nobach did not declare that expert testimony is required before an opinion related to any and all DUI-drugs may be offered. Larson's ability to operate a vehicle was shown to have been impaired by an alcohol/drug combination, and opinion testimony by a

police officer was appropriately a part of the proof. So long as the State lays a sufficient foundation for an officer's training and experience in discerning the effects of marijuana, lay opinion testimony that a person is under the influence of marijuana may be admissible under Montana Rule of Evidence 701. Considered aggregately, the training and experience of King and Schmill provided sufficient foundation for lay opinion on marijuana impairment. Further, given overwhelming proof of Larson's guilt, error, if any, was harmless.

Jury Instruction. The court's instructions, as a whole, properly advised the jury about the appropriate allocation of the burden of proof and the appropriate consideration of the fact of Larson's refusal to submit to a blood test. Nothing in the court's instructions can be read to require the jury take Larson's refusal alone as sufficient to prove impairment or require that he prove his innocence or present exculpatory evidence during the trial. Larson at his trial proposed a jury instruction that essentially parroted the dissenting opinion from State v. Michaud, 2008 MT 88, 342 Mont. 244,180 P.3d 636, and the trial court was correct to reject it.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED LARSON'S MOTION TO SUPPRESS. (APPELLANT'S ISSUE II.)

Larson challenges the district court's decision to deny his motion to suppress on various grounds. The State discusses each ground in turn.

A. The District Court Correctly Concluded That Deputy King Had a Particularized Suspicion to Conduct an Investigative Stop.

1. Applicable Law

Whether an officer had particularized suspicion to conduct an investigatory stop is a question of fact that depends on the totality of the circumstances. State v. Lee, 282 Mont. 391, 394, 938 P.2d 637, 639 (1997). In evaluating the totality of circumstances, a court should consider the "quantity, or content, and quality, or degree of reliability, of the information available to the officer." State v. Pratt, 286 Mont. 156, 161, 951 P.2d 37, 40 (1997). However, particularized suspicion does not require an officer to be certain that an offense has been committed. State v. Britt, 2005 MT 101, ¶ 12, 327 Mont. 1, 111 P.3d 217.

2. The Quantity and Quality of Objective Information Available to the Experienced Police Officers Here Amply Established Particularized Suspicion Justifying a Stop.

King had objective data and a resulting suspicion of criminal activity upon which to justify his stop of Larson's car. King's "specific and particular facts," i.e., his observation of Larson's careless driving behavior included: Larson's

screeching and spinning of his tires; his revving of his engine, progressively through an intersection with other cars and businesses in very close proximity while it was raining; and, the observation of illegal oversized tires and no mud flaps. (Tr. at 98:17 "raining"; 112:5 "convenience store right there;" 116:4-6 "the tire exceeded . . .the fender wells;" 167:167:2 other cars.) His testimony included specific points regarding the reasons he suspected careless driving. King had sufficient training and experience to trust and interpret his initial observations and to follow-up with further investigation. King is also a trained auto mechanic who was well aware of traction control. (Tr. at 115:10 "I spent five years as a mechanic.") The District Court's finding of a particularized suspicion is supported by substantial evidence and should be affirmed.

3. Larson's Arguments Against the Court's Factual Findings Are Belied by the Record and Impermissibly Request This Court to Reweigh Evidence and Newly Assess Witness Credibility.

a. At the outset, Larson's entire "divide and conquer" approach to appellate review of his traffic stop is wrong.

Larson tackles the objective data available to King piece by piece and attempts to show that individually considered, Larson's driving behaviors were all normal behaviors. For example, Larson cites to Grinde v. State, 249 Mont. 77, 813 P.2d 473 (1991), in which officers stopped the defendant based upon their belief that the defendant "may have been carelessly or recklessly driving." After

the officers saw the defendant drive around a corner, they heard squealing tires and concluded that the noise came from the defendant's car. Grinde, 249 Mont. at 78, 813 P.2d at 474. This Court concluded that the investigatory stop was not justified because the officers did not witness any erratic driving. Grinde, 249 Mont. at 80, 813 P.2d at 475. Grinde is distinguishable here because King directly observed Larson's erratic behavior. Further, additional factors such as the rainy conditions and the presence of other traffic play qualitatively different roles here.

The point is Larson erroneously urges this Court to consider the screeching tires and revving engine in isolation, as if King had no other grounds to suspect the violation of other traffic laws. Under the totality of the circumstances test, this Court has held:

> ***[T]he question is not whether any one of [the defendant's] driving aberrations was itself "illegal"*** but rather, whether [the police officer] could point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.

Clark v. State ex rel. Driver Improvement Bureau, 2005 MT 65, ¶ 9, 326 Mont. 278, 109 P.3d 244 (emphasis supplied).

Larson's assertion that King offered no evidence to support his reasonable suspicion that Larson's tires were oversized and required mud flaps is patently incorrect. (Tr. at 99:23; 117:10; 137:4; 230:20-24; 265:9.) A law enforcement officer need not be certain that a crime is being committed in order to have a

particularized suspicion. State v. Lacasella, 2002 MT 326, ¶ 20, 313 Mont. 185, 60 P.3d 975. Experienced law enforcement officers are allowed to draw conclusions in this regard that laymen could not. State v. Gopher, 193 Mont. 189, 193, 631 P.2d 293, 295 (1981). King did not act upon one isolated observation but drew inferences from several observations that, when considered together, indicated possible criminal activity.

b. Explanations of lawful activity do not negate the totality of circumstances that lead to justification for a stop.

Larson also wrongly asserts his driving was safe, prudent, within his own lane, and at a safe speed. A law enforcement officer need not exclude all theories of lawful activity before deciding a particularized suspicion exists that unlawful activity has or is taking place. See State v. Hatler, 2001 MT 38, ¶ 11, 304 Mont. 211, 19 P.3d 822 (stating an officer need not consider all the possible legal explanations for a defendant's behavior). The fact that Larson believes he was driving prudently is neither here nor there. State v. McMaster, 2008 MT 294, ¶¶ 15-16, 345 Mont. 408, 191 P.3d 443 (recognizing that "a series of innocent actions, when taken together, may warrant further investigation"). The fact that Larson at the suppression hearing attempted to have King state whether Larson's vehicle met any lawful exception to the mud flap law is thus also immaterial. (See Tr. at 115-16.) This record shows that sufficient objective data was available

to King for him to draw certain inferences that resulted in his suspicion that Larson had committed, was committing, or was about to commit an offense or several offenses.

c. Larson impermissibly requests this Court to reweigh the evidence and newly assess the credibility of the state's witnesses.

Larson makes no legitimate argument that the trial court's findings are clearly erroneous and not supported by substantial evidence, or that the court misapprehended the effect of the evidence, or that this record supports a firm conviction that a mistake has been made. Rather, Larson's assertions seek to have this Court reweigh the evidence, resolve conflicting testimony anew, and adopt his perspective of the facts of the night of the stop. For instance, Larson asserts, "King did not observe Larson driving carelessly." (Appellant's Br. at 22.) Larson clearly wants to present his version of the evidence. This Court, however, does not reevaluate any conflicts in the evidence presented to the trier of fact, State v. Whiteman, 2005 MT 15, ¶ 15, 325 Mont. 358, 106 P.3d 543. This Court should reject Larson's impermissible request to reweigh evidence and reassess the credibility of the State's witness.

d. Larson cavils at the district court's written order.

Larson apparently suggests the district court omitted findings regarding Larson's oversized tires and mud flaps. (Appellant's Br. at 22.) More incredibly,

at Appellant's Brief at 20, Larson asserts that the "District Court did not enter specific findings of fact when it denied Larson's suppression motion asserting there was a lack of particularized suspicion for the stop." The record refutes Larson's assertions. (D.C. Doc. 33 at 4-5 stating "King had particularized suspicion based on . . . careless driving . . . as well as observed oversized tires and no mud flaps.")

Even if Larson's assersions had any merit, a district court's suppression order need not exhaustively resolve and discuss every minutiae of adduced evidence. A district court's findings suffice if they dispose of the material issues and provide a clear rationale for ordering a grant or denial of the requested relief. See In re Mental Health of S.C., 2000 MT 370, ¶ 14, 303 Mont. 444, 15 P.3d 861 (rejecting Appellant's argument that the district court failed to make distinct findings of fact and state explicit reasons why involuntary medication was ordered when it was abundantly clear from the court's order on the whole why the district court concluded that involuntary medication was the least restrictive and most appropriate alternative); Williams v. State, 2002 MT 189, ¶ 27, 311 Mont. 108, 53 P.3d 864 (citation omitted). Further, this Court has adopted the doctrine of implied findings for purposes of reviewing findings of fact. State v. Wooster, 2001 MT 4, ¶ 18, 304 Mont. 56, 16 P.3d 409. That doctrine provides that where "findings are general in terms, any findings not specifically made, but necessary to the

[determination], are deemed to have been implied, if supported by the evidence." Id. (quoting Interstate Brands Corp. v. Cannon, 218 Mont. 380, 384, 708 P.2d 573, 576 (1985)).

This Court may, but need not here, apply the doctrine of implied findings to address Larson's befuddling suppositions about omissions in the suppression order. The order expressly states critical facts upholding the deputy's stop and specifies objective data supporting the particularized suspicion. (D.C. Doc. 33 at 4-5.) The commission of even one traffic violation, of course, suffices to justify a traffic stop. See State v. Farabee, 2000 MT 265, ¶ 19, 302 Mont. 29, 22 P.3d 175 (officers who stopped Farabee's vehicle had a particularized suspicion that Farabee was breaking the law; the officers observed what appeared to be a broken headlight, which violated state traffic law even in daylight hours). Larson has simply chosen to ignore the court's clear text and clear rationale.

Further, the fact that the district court also discussed available grounds for a stop King made after he turned on his lights is also not dispositive as this Court has upheld district court rulings that reach the right result both in cases in which incorrect reasons have been expressed and the correct reasons have not been expressed. See State v. Veis, 1998 MT 162, ¶ 16, 289 Mont. 450, 962 P.2d 1153 ("Regardless of the District Court's reasons for its decision, we will not reverse the decision if it reaches the right result, even if for the wrong reason.").

e. Larson speculates rather than points to matters of record.

Larson charges that the district was in "a rush to hold the pretrial hearings before the impaneled jury returned" and so erred in disposing of his suppression motion. (Appellant's Br. at 20.) This record refutes Larson again. The suppression hearing was continued with the consent of Larson's counsel because King could not appear earlier to testify. (D.C. Doc. 21 State's Mot. to Continue, at 2. "Although Deputy King will be available for the May 11th trial setting, the Defendant would like to exercise his right to have an evidentiary hearing on the outstanding issues.") During the suppression hearing, Judge Larson afforded counsel for both parties sufficient opportunity to argue their positions and present evidence. (Tr. at 93:8-9, Court: "Well, if there's an argument about whether there was a search, that's why we're having a hearing . . . . Is that all we have primarily unless your client wants to testify, Mr. Schandelson?" Schandelson: "At this point just law enforcement." Court: "Okay. So we'll proceed.") In fact, Judge Larson expressly commented on the generosity of time available to hear Larson's suppression claims. (Tr. at 185: 20-23 Court: "That's one of the luxuries of having a little bit of time here. You can think about things over lunch.") The fact that the court filed its written disposition right after the suppression hearing concluded but before trial commenced demonstrates its proficiency, not precipitousness.

No authority Larson cites supports the novel theory that a district court may simply be charged with "rushing to judgment" as a basis for appellate relief. "It is not this Court's job to conduct legal research" for the appellant or to engage in guesswork "or to develop legal analysis that may lend support to that position." Johansen v. Department of Natural Resources & Conservation, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653. Because this record shows nothing but the appropriate conduct of a capable trial court commendably fulfilling its judicial tasks, this Court should not countenance Larson's idle, unsubstantiated conjecture. See In re T.H., 2005 MT 237, ¶ 43, 328 Mont. 428, 121 P.3d 541 (refusing to address an argument not supported by legal authority as required by Mont. R. App. P. 23(a)(4)); see also Langford v. State, 287 Mont. 107, 115, 951 P.2d 1357, 1362 (1997) (Langford's purely conjectural assertions that he potentially would have a due process-type right to avoid execution under the earlier version of the statute does not create a current substantive right).

B. King's Traffic Stop and Field Sobriety Testing Did Not Exceed the Permissible Scope of Appropriate Investigation.

1. After King Lawfully Initiated Contact With Larson Based on His Particularized Suspicion That Larson Had Committed Traffic Offenses, Additional Instances of Larson's Erratic Driving Arose That Permitted Field Sobriety Testing.

To conduct field sobriety tests, an officer must have a particularized suspicion that a driver is under the influence of alcohol or other intoxicants.

Hulse v. DOJ, Motor Vehicle Div., 1998 MT 108, ¶ 38, 289 Mont. 1, 961 P.2d 75. In some cases, an officer's particularized suspicion that a driver is impaired provides the initial basis for an investigatory stop. Id. at ¶ 39. In other cases, an investigatory stop is initiated to investigate another offense, and, in the lawful course of the investigatory stop, the officer develops a particularized suspicion that the driver is under the influence. Id. at ¶ 40. The scope of the investigation can escalate, "provided the scope of the investigation remains within the limits created by the facts upon which the stop is predicated and the suspicion which they arouse." Id. Here, King lawfully initiated contact with Larson based on his particularized suspicion that Larson had committed traffic offenses. King saw additional evidence of erratic driving, including Larson's excessively wide turn and his crossing into the oncoming lane. (Tr. at 99:13-17.)

Larson's reliance on State v. Lafferty, 1998 MT 247, 291 Mont. 157, 967 P.2d 363, is misplaced. In Lafferty, the State argued that Lafferty's crossing of the fog line was evidence of impaired driving. This Court there refused to accept the State's argument that crossing the fog line was indicative of impaired driving, because the officer did not testify to that effect; rather he stated that the driving was "not normal traffic procedure." Lafferty, ¶ 15. In Lafferty, this Court also reiterated its holding in Hulse--that crossing the centerline and the fog line constitutes erratic driving. Id., ¶ 16.

King testified extensively about Larson's movements, both slow and erratic, as indicative of impairment. But, this was not all. When King first spoke with Larson, King noted Larson's slurred words, slow talking, and abnormally slow movements when Larson was requested to retrieve his license, proof of registration and insurance. (Tr. at 100:13-17; 231:9-15.) King also learned from his fellow deputy at the scene, Gordon Schmill, that Larson had marijuana odors emanating from his car, he had bloodshot, glassy eyes, and was also observed talking slowly, and evincing signs of alcohol impairment. (Tr. at 157:19; 168:23; 307:1.) See McMaster, ¶ 16 (stating an arresting officer can rely on information from another officer to establish particularized suspicion). Further, shortly after the stop, Larson volunteered he had been drinking alcohol during the day.

Thus, after King initiated a lawful investigatory stop, he developed a particularized suspicion that Larson was impaired, which justified the DUI investigation. An officer does not have to specify which type of impairment--alcohol or drugs, or a combination of both, he is investigating. Moreover, "a 'particularized suspicion' does not require certainty on the part of the law enforcement officer." See State v. Morsette, 201 Mont. 233, 241, 654 P.2d 503, 507 (1982).

Larson again errs by urging a reweighing of the evidence according to his viewpoint, for example, by emphasizing the video over the officers' testimony.

When reviewing particularized suspicion findings, this Court does not exercise de novo review, but the more deferential "clearly erroneous" standard. State v. Roberts, 1999 MT 59, ¶ 11, 293 Mont. 476, 977 P.2d 974. Under this standard, this Court does not review the record to determine whether the record will support findings of fact that differ from the district court's findings, but whether the record contains substantial credible evidence that supports the findings actually made. Benjamin v. Anderson, 2005 MT 123, ¶ 55, 327 Mont. 173, 112 P.3d 1039. The officers' testimony and the video's corroboration provide substantial credible evidence that supports the district court's particularized suspicion finding, and the court did not misapprehend the evidence or make a mistake when it found that particularized suspicion existed.

2. Larson's Belief That His Detention Went "Well Beyond Five to Ten Minutes," Without More, Does Not Establish an Unreasonable Duration for the Stop.

As the Court noted in In re D.R.B., 2004 MT 90, ¶ 27, 320 Mont. 516, 88 P.3d 808, Mont. Code Ann. § 46-5-403 provides that an investigative stop may not last longer than is necessary to effectuate the purpose of the stop. However, an investigative stop may become further prolonged and the scope of the stop enlarged if the officer acquires additional information during the stop and the officer's suspicions are further aroused. See State v. Carlson, 2000 MT 320, ¶ 23, 302 Mont. 508, 15 P.3d 893, citing Hulse, ¶ 40. Larson disagrees with the

emerging particularized suspicion that the two deputies encountered. Larson's main factual assertion, however, is apparently that he "was detained well beyond five to ten minutes." (Appellant's Br. at 30.) An appellant cannot fulfill his burden to establish error by a district court in the absence of legal authority or by proferring unsubstantiated, conclusory allegations. State v. Bailey, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032. Larson's contention is conclusory and meritless.

C. King's Impairment Inquiry Was Not a "Search" But a Lawful Encounter Between a Police Officer and a Citizen.

Larson contends King's questioning was unlawful on other grounds. The State will not repeat its contention, established above, that the deputies had progressively evolving suspicions that Larson was impaired. For argument's sake, the State will directly address Larson's arguments that King's questioning alone constituted a search.

1. A Terry[2] Stop Is Not Automatically a Seizure.

Relying on Berkemer v. McCarty, 468 U.S. 420 (1984), Larson apparently suggests every Terry stop is a seizure. (Appellant's Br. at 26.) On the contrary, officers can ask a moderate number of questions without a brief investigative or Terry-type stop becoming a custodial arrest situation requiring Miranda warnings. Berkemer, 468 U.S. at 439-40. Here, King asked Larson about his drinking just

[2] Terry v. Ohio, 392 U.S. 1 (1968)

minutes after the stop. Only after Larson had repeatedly showed new and additional signs of impairment, was removed to the patrol vehicle, and charged with DUI, was he then arrested.

Larson asks this Court to lay down a bright-line rule that pulling someone over lawfully automatically converts a Terry detention into a full-blown arrest. The United States Supreme Court, however, has declined to lay down a bright-line rule for when an investigative detention becomes an arrest, recognizing that "commonsense and ordinary human experience must govern over rigid criteria." United States v. Sharpe, 470 U.S. 675, 688 (1985). There is no "litmus-paper test" for determining when a stop has transcended Fourth Amendment reasonableness. Florida v. Royer, 460 U.S. 491, 506-07 (1983) (plurality).

2. Police Requests for Consensual Information Do Not Automatically Equate With a Search.

Contrary to what Larson implies in his brief, not all police/motorist encounters occurring after the purpose for the lawful stop has concluded or is about to conclude are unlawful. See Florida v. Bostick, 501 U.S. 429, 439 (1991) (rejecting the Florida Supreme Court's presumption that every encounter between a police officer and a citizen occurring on a bus is a seizure and stating that "a court must consider all the circumstances surrounding the encounter" to determine what constitutes a seizure). Under federal constitutional law, a police officer who lawfully stops a vehicle may further question the driver and passengers about such

matters as their citizenship, immigration status, and even suspicious circumstances, but further detention or conducting a search must be based on consent or probable cause. See United States v. Drayton, 536 U.S. 194, 200 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."). Contrary to what Larson specifically argues in his brief, the request for consensual information does not require any suspicion of wrongdoing. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 227 (1973) (reasoning that consensual searches are important to law enforcement: "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.").

D. The Police Did Not Violate Larson's Right to a Miranda Warning.

Without expressly saying so, Larson insists that the district court erred in determining he need not have been Mirandized before he voluntarily admitted smoking marijuana and voluntarily retrieved his marijuana.

1. Voluntariness of Consent Is Determined From the Totality of the Circumstances.

Larson makes much of his assertion that the officers could have Mirandized Larson but did not. In determining whether consent was voluntarily given under specific circumstances, however, this Court considers various factors that include,

but are not exclusively controlled by, whether the defendant was under arrest at the time consent was requested (State v. Yoss, 146 Mont. 508, 409 P.2d 452 (1965)); whether consent was sought after the search had already been conducted (State v. Olson, 2002 MT 211, ¶ 22, 311 Mont. 270, 55 P.3d 935); whether the defendant had been expressly informed that he or she had the right to refuse to be searched (Olson, ¶ 21); and, whether the defendant was threatened or coerced in any manner (State v. Rushton, 264 Mont. 248, 259, 870 P.2d 1355, 1362 (1994) (defendants were told that they would be held in custody in their home "for a number of hours" if they did not consent to a warrantless search). Voluntariness of consent is a question of fact to be determined from the totality of the circumstances. State v. Stemple, 198 Mont. 409, 412-13, 646 P.2d 539, 541 (1982).

When reviewing a Miranda issue, this Court considers:

> 1) the totality of the circumstances surrounding the defendant's questioning to determine whether the defendant was deprived of his or her freedom. State v. Honey, 2005 MT 107, ¶ 18, 327 Mont. 49, 112 P.3d 983;
>
> 2) the time and place of interrogation, the length and mood of interrogation, and persons present during the questioning to determine whether a "reasonable person" would feel free to leave. Id. (citation omitted); and,
>
> 3) whether the suspect was arrested at the end of the questioning session. Id. (citation omitted); and,

4) regardless of the custody determination, whether the defendant's confession was voluntary, in that it was given "freely, voluntarily, and without compulsion." Id. at ¶ 20.

Here, the district court reviewed the totality of the circumstances, and found that Larson gave self-incriminating information freely and voluntarily. (D.C. Doc. 33 at 7.) The record bears out Larson's spontaneous behavior. King testified that Larson acted freely (Tr. at 138:3-6) and with such liberty that he purposely went back to his car and retrieved the incriminating items. (Tr. at 142:6; 300:23-24.)

Larson simply requests this Court reweigh King's testimony anew. But, this task was already performed by the district court, which alone had the prerogative to decide credibility issues. Significantly, Larson claims no one in his position would have felt other than being under custody. (Appellant's Br. at 33: "No reasonable person in Larson's position would have felt free to leave or terminate the questioning.") This is a curious assertion since at the suppression hearing Larson did not claim coercion, and he did not, in fact, testify at all.

2. Furthermore, Assuming for Argument's Sake That Larson Was in Custody for Miranda Purposes, Larson Was Not Interrogated.

Spontaneous remarks made to officers before receiving the warnings, in the absence of questioning, are admissible as volunteered statements. United States v. Gordon, 974 F.2d 1110, 1115-16 (9th Cir. 1992). "As was pointed out in Miranda,

a confession which is truly voluntary is not foreclosed from evidence because the statement was made before the person confessing had been warned of his rights[.]" State v. DePue, 237 Mont. 428, 429, 774 P.2d 386, 389 (1989) (informed that charges might be brought because of an alleged assault against another inmate, the defendant's remark, "[f]or what? I only used my fist[,]" a voluntary statement not requiring Miranda warning); see also State v. Belgarde, 1998 MT 152, ¶ 28, 289 Mont. 287, 962 P.2d 571 (defendant's statement that he was "too drunk to drive" made to officer after arrest but before Miranda warnings admissible because not obtained by questioning).

> [T]he special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (footnote omitted). See cases collected at J.F. Ghent, Annotation, What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring That Suspect Be Informed of His Federal Constitutional Rights Before Custodial Interrogation, 31 A.L.R.3d 565, §§ 29-35 (2005).

This record does not support Larson's argument that the district court's findings were clearly erroneous. King expressly stated multiple times that he did not ask Larson to produce drug evidence before Larson spontaneously acted to

retrieve the drugs. As the findings meet the applicable standard of review, this Court should agree with the district court that Larson's actions and remarks to King were voluntary. See State v. Kutnyak, 211 Mont. 155, 164, 685 P.2d 901, 906 (1984); see also State v. Damon, 2005 MT 218, ¶¶ 32-33, 328 Mont. 276, 119 P.3d 1194 (rejecting Damon's contentions that all of his statements made to the investigating officer should have been suppressed due to the officer's failure to recite the advisories because the record reflected that Damon's spontaneous utterances were not responsive to any specific questioning by the investigating officer).

The mere asking for consent does not constitute an interrogation for an incriminating statement requiring the Miranda warnings. Such a request to search need not be preceded by Miranda warnings. The Ninth Circuit Court of Appeals United States v. Ritter, 752 F.2d 435, 438 (9th Cir. 1985) stated:

> A Fourth Amendment controlled search does not involve Fifth Amendment self incrimination rights. Therefore, a request to search need not be preceded by Miranda warnings. . . . Lack of a Miranda warning does not vitiate a consent to search. . . . [A] consent to search is not the type of incriminating statement toward which the Fifth Amendment is directed.

Other state and federal courts have likewise held that requests for consent to search do not constitute interrogation for Miranda purposes because consent is not an incriminating statement. See State v. Little, 421 N.W.2d 172, 174 (Iowa Ct. App. 1988) (citing United States v. Cherry, 794 F.2d 201 (5th Cir. 1986); Cody v.

Solem, 755 F.2d 1323 (8th Cir. 1985); United States v. Ritter, 752 F.2d 435 (9th Cir. 1985); Hubbard v. Jeffes, 653 F.2d 99 (3d Cir. 1981)); State v. White, 770 S.W.2d 357, 359 (Mo. Ct. App. 1989) (citing the same authorities and Smith v. Wainwright, 581 F.2d 1149, 1152 (5th Cir. 1978); United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977) (consent to search is not in itself testimonial or communicative in nature and is not the type of incriminating statement protected by the Fifth Amendment)). Larson's actions and statements were not obtained in violation of his privilege against self-incrimination. Nor were they obtained as a product of an illegal search.

II. THE DISTRICT COURT PROPERLY DENIED LARSON'S MOTION TO DISMISS. (APPELLANT'S ISSUE I.)

Relying primarily on State v. Nobach, 2002 MT 91, 309 Mont. 342, 46 P.3d 618, Larson argues that the State failed to present sufficient foundation evidence to allow the officers to offer testimony on marijuana related behavior and therefore the State failed to present competent corroborative evidence Larson drove while impaired by marijuana.

A. So Long as a Sufficient Foundation Is Laid Concerning an Officer's Training and Experience in Discerning the Effects of Marijuana, Lay Opinion Testimony That a Person Is Under the Influence of Marijuana May Be Admissible Under Montana Rule of Evidence 701.

1. Larson's Ability to Operate Vehicle Was Shown to Have Been Impaired by an Alcohol/Drug Combination, and Opinion Testimony by Police Officer Was Appropriately a Part of the Proof.

The test for admissibility of expert testimony is whether the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue. Hulse v. State, 1998 MT 108, ¶ 48, 289 Mont. 1, 961 P.2d 75. Larson does not expressly contend detection of marijuana use is a matter sufficiently beyond common experience. He therefore appears to argue only about foundation.

At Larson's trial, King and Schmill were not admitted as experts but were permitted to testify that based their observations--including the odor of marijuana from Larson's car, his bloodshot eyes and slurred speech, driving behavior, together with his admission of smoking marijuana an hour earlier--Larson was under the influence of alcohol or drugs. This type of lay witness testimony is admissible. See State v. Hayashi, 2004 Haw. LEXIS 296, *3 (Haw. Apr. 29, 2004) (defendant's ability to operate vehicle in careful and prudent manner was shown to have been impaired by drugs, and opinion testimony by police officer was part of proof); Sonsthagen v. Sprynczynatyk, 663 N.W.2d 161, 166 (N.D. 2003) (officer

had sufficient training and experience to conduct field sobriety tests on driver suspected of driving under influence of drugs and could testify at license suspension hearing; tests were designed primarily to detect alcohol-impaired drivers, but people under influence of drugs also demonstrate some of same characteristics).

In every Montana DUI case where an officer makes an arrest because he or she believes that a driver is under the influence of alcohol, there is seldom a dispute about whether the officer can testify to his or her opinion that the defendant was under the influence of alcohol. See Nobach, ¶ 15 ("[T]he fact is that most adults are sufficiently experienced with people who have been drinking to offer an opinion that a person is, in fact, intoxicated from alcohol based on their personal observations."). This opinion is an admissible lay opinion, firmly rooted under Montana Rule of Evidence 701. Is the situation different, however, where the officer arrives at an opinion that the driver is impaired by marijuana? This issue was addressed in Commonwealth v. Yedinak, 676 A.2d 1217 (Pa. 1996).

In Yedinak, the defendant was stopped after he was observed driving erratically. Id. at 1219. Field sobriety tests were administered and the defendant was unable to walk and repeatedly collapsed. In addition, he was disoriented and was unable to understand instructions. The defendant was subsequently arrested and charged with driving under the influence of a controlled substance.

At trial, the arresting officer was permitted to testify that, in his opinion, the defendant was under the influence of marijuana to a degree that he was incapable of driving safely. Id. at 1219. The officer had received training in narcotic detection and, based upon his experience from prior drug arrests, was familiar with the effects of marijuana. Id. at 1221. On appeal, the defendant argued that the trial court erred in admitting the officer's testimony. Specifically, the defendant claimed that the officer's opinion was improper because the officer was not an expert witness. Id.

The Pennsylvania Supreme Court disagreed with the defendant, and saw no reason to distinguish this case with that of a lay witness opinion of alcohol intoxication:

> Although this court has never addressed whether lay opinion testimony is admissible to prove drug-induced intoxication, we find no basis upon which to distinguish opinion testimony of drug-induced intoxication from opinion testimony of alcohol-induced intoxication where the witness is personally familiar with the effects of narcotics. (Citation omitted).
>
> In the instant case, [the arresting officer] based his opinion that the [defendant] was under the influence of a controlled substance on specific and articulable observations of [the defendant's] physical appearance and behavior. Moreover, [the arresting officer's] perceptions at the scene were informed by his narcotics training, prior drug arrests, and knowledge of the effects of marijuana. We conclude that [the arresting officer's] opinion was rationally based on his perceptions and helpful to the determination of a fact in issue and, therefore, the trial court did not err in admitting the officer's opinion testimony. (citations omitted).

Id., 676 A.2d at 1221 (citations omitted) (citing People v. Williams, 751 P.2d 395 (1988) (if a sufficient foundation is laid, lay opinion testimony as to whether a person is under the influence of narcotics is admissible).

2. Nobach Is Legally and Factually Distinguishable.

In Nobach, David Nobach was convicted of driving under the influence of drugs (DUID). Nobach, ¶ 1. After driving erratically, Nobach drove off the road and rolled his vehicle. Id., ¶ 4. Highway Patrolman Michael Brooks responded to the scene and took part in the investigation. Id., ¶ 5. Brooks never observed Nobach's driving. He became aware of Nobach's erratic driving by talking to other people. Id., ¶ 9. Brooks removed approximately 20 pills from Nobach's pants pocket during a pat down search. A toxicology report from Nobach's blood sample revealed that there were prescription medications in Nobach's blood. Id., ¶ 6.

At trial, over Nobach's objection, Brooks testified that based on his training and experience, Nobach's ability to drive safely was diminished as a result of his consumption of drugs. Id., ¶ 10. Nobach "objected on the basis of lack of foundation--on a pharmological basis--for an expert opinion by Brooks regarding the effect the drugs mentioned in the toxicology report would have had on Nobach." Id., ¶ 9. Nobach also objected on foundation grounds to Brooks's

testimony regarding the interaction between two or more antidepressants. The district court overruled Nobach's objection. Id., ¶ 11.

This Court held that testimony by the police officer regarding the effect of prescription drugs on a motorist's ability to drive safely was deemed expert testimony that required proper foundation. Id., ¶¶ 8-22. Contrary to Larson's suggestion, this Court in Nobach did not state expert testimony is required before an opinion related to any and all DUI-drugs may be offered. In Nobach, although proper foundation was not provided for Officer Brooks's testimony, other expert testimony by a pharmacist rendered error in admitting police officer's testimony harmless. Id.

Here, the State did not charge Larson with DUID but with driving under "the influence of alcohol and/or drugs." (Tr. at 220:24-25.) It is significant to the State's position, not Larson's, that the .023 PBT result showed that his blood-alcohol concentration was less than the legal limit. If other evidence, such as the defendant's physical condition, suggests that the defendant is more intoxicated than the test results indicate, the defendant may be under the influence of a combination of alcohol and drugs. King testified at the suppression hearing about the objective data he collected about Larson that supported this exact conclusion. (Tr. at 111:9-11 King: "[Larson] was impaired, whether it was drugs or alcohol that was causing the impairment or the combination of both.")

Many states hold that a defendant may be found guilty of driving while under the influence of alcohol if the defendant's ability to drive safely is diminished and alcohol is one contributing cause of the diminished ability. In those jurisdictions, even if the amount of alcohol ingested alone would not have been enough to find the defendant under the influence, a conviction will likely be affirmed if the defendant ingested an additional substance, either an illegal narcotic or lawful medication, which may have rendered the defendant more susceptible to the intoxicating effect of the alcohol. See, e.g., State v. Nix, 535 So. 2d 866, 869 (La. App. 1988) (defendant could properly be charged with operating his vehicle while under influence of alcoholic beverages even if he had ingested alcohol and drugs); Commonwealth v. Stathopoulos, 517 N.E.2d 450, 456 (Mass. 1988) (jury could conclude that alcohol was contributing factor to defendant's intoxication when he had blood-alcohol concentration of 0.07% and PCP was found in his car); State v. Falcon, 615 N.W.2d 436, 440 (Neb. 2000) (rejecting lower court determination that State could not convict motorist of operating under influence of alcohol or drugs without showing which substance caused impairment, reasoning that when motorist admitted drinking and smoking marijuana and arresting officer testified as to manifestations of intoxication that supported opinion of impairment, driver could be convicted, but because trial court had heard evidence about driver's guilt or innocence, double jeopardy attached to prohibit retrial);

see also State v. West, 416 A.2d 5, 9 (Me. 1980); State v. Daniels, 379 N.W.2d 97, 99 (Minn. Ct. App. 1986); Heard v. State, 665 S.W.2d 488, 490 (Tex. Crim. App. 1984).

3. Larson's Arguments are Meritless.

Larson offers his own reasons why King and Schmill were not qualified enough and then asserts his counsel was prejudicially restricted in his cross-examination of the officers' training. At the same time, Larson complains that Schmill should not have been permitted to tell the jury about his training because it permitted him to testify in a "scientific manner." Larson's double-sided tactic is bootless.

Larson presumes "tainted" evidence by his inapposite citation to State v. Michaud, 2008 MT 88, ¶ 40, 342 Mont. 244,180 P.3d 636, which regards a prejudice analysis based on an already established error stemming from a police officer's testimony about the Horizontal Gaze Nystagmus test. Larson cannot simply assume a "taint" exists from an error he has never proven. Substituting conclusory beliefs for governing authority is not enough. See State v. Bailey, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032 (stating "[i]t is the appellant's burden to establish error by a district court and such error cannot be established in

the absence of legal authority"). The issue of whether the State met foundational prerequisites for the officer's testimony presents a legal question for the trial court, not the jury. Both here and below, Larson errs in suggesting that before and until an initial determination of whether the peace officer meets some threshold "training and experience" criterion, an officer's observations cannot be said to form any valid observation. Larson more specifically suggests again, without supporting legal authority, that the National Highway Traffic Safety Administration's (NHTSA) training standards for detecting marijuana are the foundational prerequisites for lay opinion testimony at criminal trials.

Conclusory assertions aside, Larson through his counsel in any event extensively challenged the officers' training before the jury. (Tr. at 223:18; 247, 266-67; 275-77; 286; 302-02; 308; 310-13; 319-20.) Counsel used their resulting testimony to copious advantage in jury arguments. (Tr. at 358-64.) The resulting verdict was due to overwhelming evidence of Larson's guilt, not from any claim his counsel was not permitted a cross-examination girded by unsubstantiated points of law about foundational prerequisites. Cf. State v. Gollehon, 262 Mont. 1, 17, 864 P.2d 249, 259 (1993) (rejecting as "totally speculative" the argument that cross-examination of an eyewitness about his prior thefts and burglaries was "a

crucial line of questioning"). Merely stating a belief that the officers here should have had greater qualifications, without more, does not show the court here acted so arbitrarily that its rulings admitting King and Schmill, or restricting excessive and superfluous cross-examination, exceeded the bounds of reason.

4. Considered Aggregately, the Combined Training and Experience of King and Schmill Provided Sufficient Foundation to Provide Lay Opinion on Marijuana Impairment.

King and Schmill's training distinguished them from lay persons. King testified that his academy training include a component on detecting different types of drugs, including marijuana, and specific training to learn how to determine "when somebody is impaired by alcohol or marijuana." (Tr. at 96; and 97:1-4 "divided-attention tasks shut down."). While King had extensive DUI alcohol experience he had never processed a DUI drug case. (Tr. at 97.) King, however, consulted with Schmill who was on-scene and was assisting King in arresting Larson. Schmill testified about his additional eight-hour training for distinguishing a stop for impairment by alcohol as opposed to impairment due to marijuana. (Tr. at 319:19-24.)

Considered aggregately, the combined training and experience of King and Schmill provided sufficient foundation to provide lay opinion on marijuana

impairment. See People v. Shelton, 708 N.E.2d 815, 822 (Ill. App. Ct. 1999) ("[I]f a law enforcement officer has some training in how to detect drug users and, more importantly, experience in dealing with drug users, then the officer may be qualified to testify about his or her belief that the defendant was under the influence of drugs."); cf. State v. Frasure, 2004 MT 305, 323 Mont. 479, 100 P.3d 1013 (finding officers' testimony about defendant's intent to sell illicit drugs was admissible as lay opinion testimony under Mont. R. Evid. 701, since under that rule the State provided sufficient foundation that the officers had extensive training and experience in the methods used in the illicit drug trade and the prices that illicit drugs, such as methamphetamine, generally garner).

King and Schmill here were not offering scientific opinions on marijuana impairment but observations and opinions rationally based on their sound perceptions and training helpful to the determination of one of many facts in issue at Larson's trial. The State did not merely allege Larson was using marijuana. He admitted both to smoking marijuana and drinking alcohol, and he was subsequently charged for DUI after further investigation by King and Schmill. The officers never testified about a scientific principle behind a test to detect marijuana use in a person.

Here, King and Schmill testified regarding their observations of Larson and their belief based on those observations that he was impaired from marijuana, from alcohol, or from both. Their testimony was based on their experience as law enforcement officers in dealing with people using marijuana and their observations of Larson's behavior, admissions, and production of drugs from his car. There was nothing improper about their testimony. The facts in Nobach are not present here, and Larson's reliance on that case to support his claim that the officers lacked foundation for the testimony is misplaced. In sum, the trial court did not err in admitting the officers' opinion testimony.

B. Error, if Any, Was Harmless.

For argument's sake, assuming any error did occur, the challenged statements here were cumulative on Larson's charge of DUI of "alcohol and/or drugs," and any error in admitting them was thus harmless. State v. Mizenko, 2006 MT 11, ¶ 26, 330 Mont. 299, 127 P.3d 458; State v. Van Kirk, 2001 MT 184, ¶¶ 40, 42, 306 Mont. 215, 32 P.3d 735; Mont. Code Ann. § 46-20-701. Overwhelming evidence of Larson's guilt and cumulative evidence satisfying Van Kirk included: King's observation of poor driving behavior and testimony that before he stopped Larson's vehicle, he heard a "loud engine and screeching tires . . . observed . . . spinning its tires;" Larson was slurring his words, talking

slowly, and moved slowly to retrieve requested proof of registration and insurance; Larson immediately admitted to drinking alcohol earlier in the day; Larson blew a .023 on the portable breath test; Larson admitted to smoking marijuana within an hour of the stop; and he turned over a pipe and bag of marijuana to the officers.

III. THE DISTRICT COURT PROPERLY REFUSED LARSON'S PROPOSED JURY INSTRUCTION.

Larson contends that he was denied his right to a fair trial when the district court refused to instruct the jury on Larson's "longer version" of this Court's holding in State v. Michaud, 2008 MT 88, 342 Mont. 244,180 P.3d 636. Rather, Larson's "law" is actually tantamount to restating the dissenting opinion from Michaud. The district court read and distinguished the majority and dissenting opinions in that case (Tr. at 324:25), and then properly instructed the jury. Larson's issue fails.

A. The Instructions as a Whole, Fully and Fairly Instructed the Jury on the Law Applicable to the Case.

"A district court has broad discretion when it instructs the jury." State v. Hall, 2003 MT 253, ¶ 24, 317 Mont. 356, 77 P.3d 239. The district court's decision on jury instructions is presumed correct, and the appellant has the burden of showing lower court error. In re M.J.W., 1998 MT 142, ¶ 18, 289 Mont. 232,

961 P.2d 105. A district court's jury instructions must prejudicially affect the defendant's substantial rights. State v. Cybulski, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7.

The State agrees that Michaud and other precedent hold that a defendant's refusal to take a test alone cannot establish a defendant's impairment. Michaud,¶ 62. The court here did not instruct Larson's jury refusal alone sufficed. It told the jury that if a person under arrest for DUI of alcohol refused to submit to one or more tests for alcohol and/or drugs concentration, proof of refusal is admissible and the jury "may infer from the refusal that the person was under the influence. The inference is rebuttable." (Tr. at 342:13-20.)

The only purpose properly served by jury instructions is "to assure a decision consistent with the evidence and the law" and that this can only be accomplished "when the instructions are as plain, clear, concise, and as brief as possible." McAlpine v. Rhone-Poulenc Ag Co., 2000 MT 383, ¶ 24, 304 Mont. 31, 16 P.3d 1054 (quoting Busta v. Columbus Hosp., 276 Mont. 342, 916 P.2d 122 (1996) (determining that legal concepts, which in Busta included "proximate cause," "legal cause," and "reasonable foreseeability," should not be submitted to a lay jury because, for other reasons, they could distract the jury from deciding cases based on their merits)). Although a criminal defendant is entitled to an instruction on a defense theory that has support in the evidence, the defendant is not entitled to

an instruction concerning every nuance of argument, and the defendant is not entitled to put the argument into an instruction. State v. Bowman, 2004 MT 119, ¶ 58, 321 Mont. 176, 89 P.3d 986; State v. Maloney, 2003 MT 288, ¶ 27, 318 Mont. 66, 78 P.3d 1214.

In summary, the court's instructions, as a whole, properly advised the jury as to the appropriate allocation of the burden of proof and the appropriate consideration of the fact of Larson's refusal to submit to a blood test. Nothing in the court's instructions can be read to require the jury take Larson's refusal alone as sufficient to prove impairment or require Larson prove his innocence or present exculpatory evidence during the trial. The district court did not abuse its discretion by declining Larson's proposed instruction.

B. Proposing Positions of Law Rejected by the Majority in Michaud, Larson Does Not Show Any Error, Much Less Error Detrimental to His Substantial Rights.

1. Larson Reiterates His Lack of Adequate Evidence Theme.

Urging that a "Michaud error" has in fact occurred, Larson merely reiterates his sufficiency of the evidence claim, which the State will not repeat here is baseless. While Larson may feel the verdict is contrary to the weight of evidence, it was the jury's duty, as the court plainly instructed it, to evaluate and analyze the evidence and to determine the weight of the evidence and the credibility of witnesses. State v. Moreno, 241 Mont. 359, 361, 787 P.2d 334, 336 (1990). The

jury did so and believed the State's witnesses and the other evidence adduced at trial of his impairment, and their verdicts conform to that belief. See State v. Link, 1999 MT 4, ¶ 32, 293 Mont. 23, 974 P.2d 1124 (according to the verdict of guilty, "we must assume that the jury believed the State's contentions."). A jury's conclusions cannot be disturbed unless it is apparent there was a clear misunderstanding by the jury or that there was a misrepresentation made to the jury. State v. Lucero, 214 Mont. 334, 338, 693 P.2d 511, 513 (1984) (approvingly quoting State v. Swazio, 173 Mont. 440, 445, 568 P.2d 124, 127 (1977)).

2. Larson's Proposed Instruction

While Larson fails to substantiate any charge that his jury was affected by any misrepresentation of law, he would still have had the trial court advise his jury on a legal precept that even he admits was not specifically addressed in Michaud. (Appellant's Br. at 37, "The issue raised by Larson was not raised in either Morris[3] or Michaud.") Larson emphasizes his jury needed more, for instance, because the court did not explain what a "rebuttable" inference means and so, Larson apparently reasons, his jury would necessarily conclude a defendant's refusal alone would suffice to prove impairment. This line of reasoning contravenes this Court's established precedent showing a strong, long-standing respect for Montana juries. See Lindberg v. Leatham Bros., 215 Mont. 11, 22, 693 P.2d 1234, 1241 (1985)

[3] Great Falls v. Morris, 2006 MT 93, 332 Mont. 85, 134 P.3d 692.

(criticizing the viewpoint that casts the jury as being unable to sort out the different theories of a case as "very paternalistic" and showing a lack of confidence in the intelligence and common sense of the average juror); State v. Bashor, 188 Mont. 397, 414, 614 P.2d 470, 482 (1980) (citing United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975), suggesting common sense and collective judgment of one's peers, derived after weighing facts and considering the credibility of witnesses, has been the hallmark of the jury tradition); State v. Thompson, 164 Mont. 415, 424, 524 P.2d 1115, 1120 (1974) (stating that in searching for the truth, a jury is permitted to use common sense unfettered by illogical restraints).

What Larson really seems to be asserting by his belief that the district court did not go far enough in its explanation of the law was that Michaud should have been extrapolated beyond its specific holding. Together with his jury capacity suggestion, Larson has incorporated almost the exact position taken by the dissent in Michaud. See id. at ¶¶ 69-85 (Gray, C.J., dissenting, joined by Nelson, J.). Respectfully, the State submits that since the Michaud majority was presumably aware of the dissenter's opinion, the majority rejected the dissenting position, and by extension, Larson' argument here. Larson's approach further demonstrates his argument, both here and below, is not rooted in controlling Montana law.

CONCLUSION

Larson's arguments and claims are meritless. There being no showing of error in the record, this Court should affirm Larson's conviction and sentence.

Respectfully submitted this 14th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,766 words, excluding certificate of service and certificate of compliance.

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C. MARK FOWLER